Orni 8, LLC, and Orpuna, LLC d/b/a Puna Geothermal Venture *and* International Brotherhood of Electrical Workers, Local 1260. Case 20–CA–096143

June 26, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Brotherhood of Electrical Workers, Local 1260 (the Union) on January 10, 2013, the Acting General Counsel issued the complaint on January 17, 2013, alleging that ORNI 8, LLC, and ORPUNA, LLC d/b/a Puna Geothermal Venture (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish relevant and necessary information following the Union's certification in Case 20–RC–078220. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 8, 2013, the Acting General Counsel filed a Motion for Summary Judgment and brief in support of motion. On February 13, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On March 26, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 87. Thereafter, the General Counsel filed an application for enforcement with the United States Court of Appeals for the Ninth Circuit, and the Respondent filed a cross-petition for review.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

On November 26, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 20–CA–096143 and 20–RC–078220, which is reported at 361 NLRB No. 114. Thereafter, the General Counsel issued an amended complaint in Case 20–CA–096143, and the Respondent filed an answer to the amended complaint.[1] On January 23, 2015, the General Counsel filed a brief in support of its motion for summary judgment, and the Respondent filed a motion to reopen the record and a brief in opposition to the General Counsel's Motion for Summary Judgment and in support of its motion to reopen the record. Thereafter, the General Counsel filed an opposition to the Respondent's motion to reopen the record, including a motion to strike an affidavit attached to Respondent's motion, and the Respondent filed an opposition to the General Counsel's motion to strike.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to provide information, but contests the validity of the certification on the basis of the issues raised in the representation proceeding, including its assertion that the proceedings below were not valid because the Board lacked a quorum under *NLRB v. Noel Canning*, supra.[3] The Respondent also argues that the stipulated unit is no longer

[1] The amended complaint adds November 26, 2014, as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees. The complaint and amended complaint allege, inter alia, that on December 26, 2012, and November 26, 2014, the Union requested the Respondent to recognize and bargain collectively with it and to provide information that is relevant and necessary to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit, and that since about January 7, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union or to provide the requested information. The answer and amended answer admit the essential factual allegations of the complaint, and reiterate the arguments made in the underlying representation proceedings, including that the proceedings below were not valid because the Board lacked a quorum under *NLRB v. Noel Canning*, supra. The amended answer also alleges that the stipulated unit is no longer appropriate due to changed circumstances.

[2] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed a postbrief letter calling the Board's attention to recent case authority.

[3] Any alleged infirmities arising from the Court's decision in *Noel Canning* were addressed in the Board's November 26, 2014, Decision, Certification of Representative, and Notice to Show Cause in Cases 20–CA–096143 and 20–RC–078220, which is reported at 361 NLRB No. 114.

appropriate due to alleged changed circumstances since the conduct of the election. We reject this argument.[4]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that by letter dated December 26, 2012, the Union requested that the Respondent provide it with "a copy of [the Respondent's] benefit and wage structure," and that by letter dated November 26, 2014, the Union requested that the Respondent provide it with a "copy of the Respondent's wage and benefit structure, and the names and positions of all Respondent's employees." It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent raises as an affirmative defense its contention, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a general partnership with an office and place of business in Pahoa, Hawaii, and has been engaged in the business of generating and providing electrical power.[6] During the 12-month period preceding issuance of the amended complaint, the Respondent, in conducting its operations described above, provided services valued in excess of $50,000 for the Hawaii Electric Light Company, an enterprise that meets the Board's jurisdictional standards on a direct basis.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on May 14, 2012, the Union was certified on November 26, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated December 26, 2012, and November 26, 2014, the Union requested that the Respondent meet and bargain with it as the exclusive collective-bargaining representative of the unit and requested information regarding the unit employees' terms and conditions of employment. By letter dated January 7, 2013, and continuing to date, the Respondent refused to recognize the Union as the exclusive collective-bargaining representative of the unit employees, bargain with the Union in good

[4] The new evidence identified by the Respondent pertains to changes in the composition of the certified unit after the representation hearing closed. Even assuming this information is correct, it is not "newly discovered and previously unavailable" evidence warranting a hearing. The Board determines the appropriateness of a bargaining unit based upon the conditions of employment as they exist at the time of the hearing. Thus, only evidence that existed at the time of the hearing may be offered as newly discovered. *Manhattan Center Studios, Inc.,* 357 NLRB No. 139, slip op. at 3 (2011); see *Telemundo de Puerto Rico, Inc. v. NLRB*, 113 F.3d 270, 277–278 (1st Cir. 1997) ("Facts which *arise* only after the hearing has been concluded and the record closed are irrelevant, whereas facts which are not *discovered* until then (but which relate to the time frame at issue in the hearing) are potentially relevant and may be considered in the Board's discretion." (emphasis in original)). Accordingly, we find that the alleged "changed circumstances" asserted by the Respondent do not require a hearing.

[5] The Respondent's motion to reopen the record is therefore denied. In light of our decision to deny the Respondent's motion, we find it unnecessary to rule on the General Counsel's motion to strike an affidavit attached to Respondent's motion.

[6] Par. 2(a) of the amended complaint alleges these facts. In its answer, the Respondent denies this allegation. However, the Respondent, the General Counsel, and the Union, stipulated to the above facts in correcting the allegations in par. 2 of the original complaint. See Exh. 3 attached to the General Counsel's brief in support of its motion for summary judgment. Accordingly, the Respondent's denial with respect to this allegation does not raise any material fact to be litigated at a hearing.

faith, and provide information requested by the Union regarding the unit employees' terms and conditions of employment.[7]

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and by failing to provide the Union with requested information regarding the terms and conditions of employment of unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[8]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information it requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, ORNI 8, LLC, and ORPUNA, LLC d/b/a Puna Geothermal Venture, Pahoa, Hawaii, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local 1260 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

(b) Furnish to the Union in a timely manner the information requested by the Union in its letters of December 26, 2012, and November 26, 2014.

(c) Within 14 days after service by the Region, post at its facility in Pahoa, Hawaii, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices,

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[7] Although the amended complaint does not refer to the Union's December 26, 2012 written request for bargaining and for information, or to the Respondent's January 7, 2013 refusal to bargain or to provide information, those allegations are contained in the original complaint which is attached to the General Counsel's motion for summary judgment as Exh 24. In addition, the Union's December 26, 2012 letter and the Respondent's June 7, 2013 refusal letter are attached to the General Counsel's motion as Exhs. 21 and 22, respectively.

[8] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about January 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 26, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local 1260 as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time operations and maintenance employees. Excluded: All other employees, guards and supervisors as defined in the Act.

WE WILL furnish to the Union in a timely manner the information that it requested in its letters of December 26, 2012, and November 26, 2014.

ORNI 8, LLC, AND ORPUNA, LLC D/B/A PUNA GEOTHERMAL VENTURE

The Board's decision can be found at www.nlrb.gov/case/20-CA-096143 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.